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NO. 84-1184

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

MONTGOMERY CITY-COUNTY PERSONNEL BOARD, EWELL GREEN, MRS. ED REID, AND CHARLES PATERSON, PETITIONERS

VS.

TATE WILLIAMS, RESPONDENT

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT
(FROM A FINAL JUDGMENT
ENTERED ON OCTOBER 22, 1984)

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Montgomery City-County Personnel Board,
Ewell Green, Mrs. Ed Reid, and Charles
Paterson

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Paterson

STATEMENT OF ISSUES PRESENTED

1. An independant, statutorily created Board established in part to conduct and decide advesarial proceedings between the City of Montgomery and its employees is not an agent of the City for purposes of Title VII liability when it conducts such a hearing.

2. A public Board and its members, who act in a capacity functionally comparable to that of a judge, have absolute immunity in connection with the decisions they reach in an advesarial proceeding.

3. In reviewing the merits of a case as to alleged racial discrimination, the District Court's finding of discrimination is a determination of ultimate fact to which the "clearly erroneous" standard of review does not apply. Consequently, the Eleventh Circuit erred in applying the "clearly erroneous" standard to the find-

ing of discrimination by the District Court in this case.

THE PARTIES

In the District Court, the parties to this petition are the same as the parties in the District Court and in the Eleventh Circuit Court of Appeals. The plaintiff, who is respondent herein, is Tate Williams. The City of Montgomery and the Montgomery City-County Personnel Board, including the members of the Board, Ewell Green, Charles Paterson, and Mrs. Ed Reid, were defendants in the District Court, appellants in the Eleventh Circuit Court of Appeals and are petitioners herein.

The matters at issue here were raised in the District Court and have been at issue throughout this litigation.

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OPINIONS AND ORDERS BELOW

The opinion of the District Court was filed on October 19, 1982. A copy of that order is appended to this petition as Exhibit "A". The initial opinion of the Eleventh Circuit Court of Appeals was issued on May 3, 1984, affirming the judgment of the District Court. A copy of tnat opinion is appended hereto as Exhibit "B". A subsequent opinion of the Eleventh Circourt Court of Appeals denying petitioners' request for rehearing and suggestion for en banc consideration was issued on October 22, 1984. A copy of that opinion is appended hereto as Exhibit "C".

JURISDICTION

This Court has jurisdiction to grant the petition pursuant to Rule 19, of the Rules of the Supreme Court of the United States. This Court has jurisdiction

because the Eleventh Circuit Court of Appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; and has also decided a federal question in a way that conflicts with an applicable decision of this Court. Petitioner further invokes the jurisdiction of this Court on the basis that an important question is presented with regard to the application of Title VII of the Civil Rights Act of 1964.

The Jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Act 2280 of the 1971 regular session of the Alabama Legislature. That statute is submitted as Exhibit "D" to this petition.

STATEMENT OF THE CASE

The trial of this case in the United States District Court for the Middle District of Alabama was held on March 2, 1982. The District Court issued its opinion on October 19, 1982 (R. 171). The Personnel Board defendants filed their Notice of Appeal on November 17, 1982 (R. 214). On May 3, 1984, a panel of the Eleventh Circuit rendered its opinion, affirming the judgment of the District Court. A petition for rehearing and for en banc consideration followed. The Eleventh Circuit Court of Appeals issued its opinion denying the petition on

October 22, 1984.

STATEMENT OF THE FACTS[1]

The facts in this case are important because they demonstrate dramatically the injustice of the decisions of the lower courts. The District Court concluded that there was racial discrimination for facts which clearly do not support the conclusion. The Eleventh Circuit then improperly applied the clearly erroneous rule to affirm a ruling supported neither by law nor by the facts presented at trial.

In 1976, two Montgomery fire fighters were convicted of a felony related to gambling and were terminated by the City. They appealed to the City-County Personnel Board for an advesarial hearing, and in

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[1]References to the transcript of the District Court trial are included in the statement of facts even though the record has not yet been filed with the United States Supreme Court.

that hearing presented much mitigating evidence. This evidence included a very strong recommendation for reinstatement from the prosecuting attorney in their criminal cases. Because of the overwhelming mitigating circumstances presented to the Personnel Board, the Board reduced the terminations to seven (7) months suspensions without pay and benefits. One of the fire fighters also was demoted from the rank of lietenant to the lowest rank within the department. The two fire fighters were white.

More than three years later, another fire fighter was convicted of a felony involving theft and fraud, and was also terminated by the City. This fire fighter filed an appeal and for an advesarial hearing before the Personnel Board. The hearing, however, lasted only from 10 to 15 minutes, and absolutely no mitigating

factors or circumstances justifying a reduction in punishment were presented to the Personnel Board. Because of the total lack of mitigating evidence, the termination was affirmed. This fire fighter was black.

On the basis of that evidence, and that evidence alone, the District Court concluded that the City of Montgomery, its fire department and the City-County Personnel Board had unlawfully discriminated against the black fire fighter on the basis of his race. This finding of ultimate fact was improperly affirmed on the basis of the clearly erroneous rule.

Only a few other facts need be noted in connection with this petition for a writ of certiorari. The Personnel Board is a statutory creation which functions independently of the City and County of Montgomery (Act of Alabama 2280, 1971

Session of the Alabama Legislature; T. 134-135). Although the policy of the Fire Department was to terminate all fire fighters convicted of a felony, the evidence at trial was undisputed that the City-County Personnel Board was not bound by the mandatory policy of any city department. Rather, the Personnel Board had a long standing policy and practice of receiving evidence of mitigating circumstances. The evidence also was undisputed that plaintiff/appellee Tate Williams was aware of the Personnel Board's policy of hearing mitigating factors. Otherwise, of course, there would have been no need for him to have appealed his termination. He surely recognized that he had, indeed, been convicted of a felony. Because he was aware that the Board considered mitigating factors, he appealed for an advesarial hearing, and attempted to obtain assistance

from the union and from other fire fighters to introduce mitigating evidence.

It must be repeated for emphasis that although there was a mandatory policy to terminate a city employee because of a felony conviction, that policy was one of the particular city department. The statute creating the Personnel Board gave it authority to consider all facts and circumstances surrounding a particular disciplinary action, and to modify any such action it deemed appropriate. There was absolutely no evidence of any kind before the District Court to suggest that the City-County Personnel Board was bound by the disciplinary policy, mandatory or

otherwise, of a particular city department.[2]

The members of the City-County Personnel Board are appointed to six year staggered terms and are free of political influences (T. 135; 147-148). The procedure for the conduct of hearings before the Personnel Board is sent to every employee who requests a hearing, and to the employee's lawyer. (T. 142; Personnel Board Exhibit 6). The proceedings are advesarial in nature (T. 143). Both

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[2]This particular point is of special importance because of the Eleventh Circuit's panel decision. As will be argued more fully later in this brief, in both footnotes 2 and 4, of its decision, the Eleventh Circuit holds that because the policy of firing convicted felons was mandatory, any reasonable person would know that the Personnel Board could not reinstate a white and fail to reinstate a black. The Eleventh Circuit goes so far as to suggest that the nature and severity of the offenses is "irrelevant" (footnote 2). If the Eleventh Circuit's decision is correct, there would be absolutely no difference between one who pleads guilty under federal law to taking a bet (which is a felony) and one who is convicted of rape and murder.

parties may be represented by attorneys of their choice (T. 143). They may subpoena witnesses, swear witnesses, present evidence, and cross-examine (T. 143). The employee has the right to confront all witnesses who testify against him (T. 144). Both oral and documentary evidence is allowed (T. 144). Although strict rules of evidence are not adhered to, no finding against an employee can be based only on hearsay (T. 145). The standard for admissibility is relevance (T. 145). If there are objections to evidence, the Personnel Board rules on those objections (T. 144).

The Personnel Board regulates the course of the hearing (T. 145). Both parties can make opening statements (T. 145). Because the City has the burden of proof, it presents its evidence first (Personnel Board Exhibit 6; T. 146), and the employee may cross-examine. After the

City presents its case, the employee can put on a defense (T. 146). Final arguments also are permitted (T. 146). Either party can record the proceedings, and notice is given of that and all other rights (T. 128, 143; Personnel Board Exhibit 6). The recording can be by tape recorder with little or no expense to the employee.

The Personnel Board bases its decision exclusively on the evidence presented at the hearing (T. 147). It has no other mechanism by which to secure evidence (T. 150). The members of the Board exercise independent judgment (T. 147), and deliberate in isolation with no one present, not even the director of the Personnel Department (T. 137). The Board functions like a judge or a jury would in a civil court (T. 148).

At the time of the hearing, the

employee already has been terminated (T. 149). The Personnel Board is in no sense the employer (T. 149). It simply decides whether to affirm, reverse, or modify the employer's action. After the Board reaches a decision, the parties are informed of the decision in writing (T. 148).

Although under Section 2280, the employee has no right to appeal from a decision of the City-County Personnel Board, as a matter of law one can appeal on the basis that the Personnel Board's decision was so lacking in evidence that it constituted an arbitrary decision violative of due process. This is the same standard of review available to most public employees.

It must be emphasized that the function fulfilled by the Board during the times complained of in this case was that of a judicial finder of fact. Although

under Act 2280, the Board had other functions related to classifying employment positions and establishing registers for city and county employees, those functions were in no way involved in this lawsuit. This fact is important because of the law which recognizes different tests for liability depending upon which of several functions a particular defendant may have been performing at the time of the matters complained of by the plaintiff. Just as the Chief Justice of the Alabama Supreme Court has both administrative and judicial functions, the City-County Personnel Board also has judicial and administrative functions. Just as the Chief Justice of the Alabama Supreme Court would have liability for violating Title VII in his employment of court personnel, he could not properly be sued for rendering a decision which the losing party felt to be racially motivated. The same is true for the members of the City-County Personnel Board.

ARGUMENT

I.

AN INDEPENDANT, STATUTORILY CREATED BOARD, ESTABLISHED IN PART TO CONDUCT AND DECIDE ADVESARIAL PROCEEDINGS BETWEEN THE CITY OF MONTGOMERY AND ITS EMPLOYEES, IS NOT AN AGENT OF THE CITY FOR PURPOSES OF TITLE VII LIABILITY WHEN IT CONDUCTS SUCH A HEARING

This issue merits Supreme Court consideration because its resolution involves two important questions. The first question involves an interpretation of Title VII. The Eleventh Circuit decision holds that the Personnel Board is the agent of the city "employer" and is, therefore, covered by Title VII.

This decision, under the facts of the present case is incorrect. It is incorrect because the Court of Appeals fails to recognize that the same entity performing different functions may be subject to

varying standards of liability. That is, both the law and practical experience dictate that a party's liability depend upon the function in which the party was operating at the time of the matters complained of in the complaint. Consequently, although when performing certain functions a defendant may be an "employer's agent", when performing other functions that same defendant will not be an employer's agent. When, therefore, a defendant is acting in a capacity unrelated to access to employment with a designated employer, the very critical question arises as to whether or not that defendant falls within the purview of Title VII. This issue merits Supreme Court consideration.

It should be noted in this case that the Personnel Board defendants were sued under 42 U.S.C. Section 1981, 1983 and 1985, as well as under Title VII. All

causes of action alleged under the former sections were properly dismissed on the ground that the applicable limitations period had expired. Those statutes would have furnished the appropriate remedy if the allegations in the complaint were true. Because the statute of limitations has expired on all such claims, however, the issue before the Court is the applicability of Title VII.

To be liable under Title VII, one must be either an "employer" or an "employment agency", with regard to the functions and acts complained of in the complaint. It is not sufficient that the defendants may have Title VII employment type duties which are unrelated to those matters complained of and which had no bearing on the plaintiff.

In this case, the members of the City-County Personnel Board are charged with

deciding an adjudicatory proceeding in a racially discriminatory manner. This allegation does not make them "employers".

There is no allegation and no proof that the Board either hired or failed to hire an employee on the basis of race. There is no allegation or proof that the Personnel Board members adopted any rules which are racially discriminatory. Indeed, there is no allegation or proof that the Personnel Board in any way contributed to Tate Williams' losing his job. Rather, it is undisputed that Tate Williams was terminated without the participation or the knowledge of the Personnel Board members. The Board's participation was triggered only by Tate Williams' appeal of his termination.

The Eleventh Circuit decision held that since the Board controls access to employment opportunities within the City,

it is an agent of the City for those purposes. This may be true when the Personnel Board is classifying positions for employment or when it is establishing registers from which employees ultimately are chosen. It is not true, and cannot be true, however, when the Personnel Board is sitting as a statutorily mandated independent, adjudicatory body to determine an advesarial dispute between the City and one of its employees.

When the Board is performing adjudicatory functions, it is in no different position from the circuit court in other counties in the state. Certain counties in Alabama have no personnel board. When a public employee is discharged, his only appeal is to the circuit court of the county in which the employee resides. No one would suggest that a state circuit court, in hearing an employment dispute

between a city employer and the city's employee, is controlling access to employment opportunities, so as to subject the court to Title VII scrutiny.

Absolutely the only differences between the City-County Personnel Board and the hypothetical court described in the preceding paragraph is that the Personnel Board sometimes does perform functions which could be said to effect access to city employment opportunities. Because those functions are not involved in this case, however, they can have no bearing on whether Title VII is applicable. A few analogies should make this point clear.

The Chief Justice of the Alabama Supreme Court has both administrative duties and judicial duties. If in employing court personnel, the Chief Justice bases his decisions on racial criteria, the Chief Justice may well have liability

under Title VII. If, however, the Chief Justice is accused of having based a judicial decision on racial considerations, he may not be subjected to suit under Title VII.

The law recognizes distinctions based upon the particular function the defendant was performing at the time of the matters complained of in the complaint. In Imbler vs. Pachtman, 424 U.S. 409 (1976), the United States Supreme Court held that a district attorney has absolute immunity from Section 1983 liability for those prosecutorial activities "intimately associated with the judicial phase of the criminal process." These activities include the initiation of a prosecution and the presentation of the government's case.

Case law has made clear, however, that where prosecutors act in an "investi-

gative" or an "administrative" capacity, only the qualified "good faith" immunity operates. See e.g., Taylor vs. Kavanagh, 640 F.2d 450 (2nd Cir. 1981); Powers vs. Coe, 728 F.2d 97 (1984). Despite that a district attorney fulfills functions which provide him with absolute immunity when he is fulfulling those functions, when he is acting in a different capacity, he enjoys no such immunity.

The situation here is analogous. The fact that the Personnel Board may be subject to Title VII scrutiny when it is controlling access to city employment opportunities does not mean that it is subject to Title VII scrutiny in connection with all of its activities. Indeed, when the Personnel Board sits as an independent court to determine a dispute beween the City and one of its employees, it is not controlling access to City employment

opportunities.[3] Rather, it is fulfulling its statutory mandate to independently adjudicate disputes, and it is not subject under such circumstances to Title VII scrutiny.

II.

A PUBLIC BOARD AND ITS MEMBERS, WHO ACT IN A CAPACITY FUNCTIONALLY COMPARABLE TO THAT OF A JUDGE, HAVE ABSOLUTE IMMUNITY IN CONNECTION WITH THE DECISIONS THEY REACH IN AN ADVESARIAL PROCEEDING

This issue is appropriate for Supreme Court consideration on certiorari because it involves an analysis of Butz vs. Economou, 438 U.S. 478 (1978). Petitioner/

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[3]It should be emphasized that even when the Personnel Board exercises functions which can be said to control access to City employment opportunities, it functions in a capacity completely independent from the City. It is in no sense an agent of the City under traditional agency law. That is, the City has no right to control its activities. It may, however, under such circumstances, fall within the purview of Title VII.

defendants contend that the Eleventh Circuit's decision is contrary to the Butz rationale. The issue presented is extremely important because it effects the willingness of citizens to serve in non-paying positions of responsibility which involve the exercise of judicial functions. This is especially true in a context such as the present one, where the members of the City-County Personnel Board depend entirely upon the evidence presented to them in reaching a decision. If evidence is not presented which might have otherwise effected the Board's decision, under the opinion of the Eleventh Circuit, the Board is exposed to liability. Essentially, the Board's exposure is out of its control. This circumstance highlights the need for the Supreme Court to reconsider the issue of quasi-judicial immunity as it applies to people and entities performing functions

comparable to that of a judge.

As already noted, the leading case on the issue of absolute quasi-judicial immunity is Butz vs. Economou, 437 U.S. 478, S.Ct. 2894 (1978). That case extended judicial immunity to executive officials acting in a judcial capacity. In discussing the responsibility of a defendant hearing examiner within the Department of Agriculture, the Court stated that "[j]udges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities." 98 S.Ct. at 2913. Immunity is necessary because "controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus."

98 S.Ct. at 2913.

In deciding whether an administrative hearing official should be entitled to absolute judicial immunity, the Court followed a "functional comparability" analysis.

> "We think that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudications should also be immune from suits for damages. The conflicts which federal hearing examiners seek to resolve are every bit as fractious as those which come to court. As the Bradley opinion points out: 'When the controversy involves questions affecting large amounts of property or relates to a matter of general public concern, or touches the interest of numerous parties, the disappointment occasioned by an adverse decision, often finds vent in imputations of [malice].' Moreover, federal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process. The proceedings are adversary in nature. They are conducted before a trier of fact insulated from

political influence. A party is entitled to present his case by oral or documentary evidence, and the transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision. The parties are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the record.

There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is 'functionally comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenaes, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressure by the parties or other officials within the agency." 98 S.Ct. at 2914 (Emphasis added)

Because federal examiners within the Department of Agriculture have responsibilities "functionally comparable" to those

of a judge and because of safeguards which minimize the risk of unconstitutional acts by one presiding at an agency hearing, the Supreme Court held that hearing examiners are entitled to absolute immunity. By analogy, the same must also be true of defendants Reid, Green and Paterson. The evidence is undisputed that all of the safeguards which apply to hearing examiners also apply to members of the Personnel Board. Indeed, even more procedural due process safeguards apply to Personnel Board procedures than the agency hearings within the Department of Agriculture. (See the Statement of Facts).

In short, the Personnel Board defendants perform a role "functionally comparable" to that of a judge or a jury in a civil case. Under the law, people who serve the public by engaging in such conduct cannot be held accountable for

reaching a decision contrary to that desired by a particular party. Every policy rationale giving rise to a doctrine of absolute immunity applies with full force to the role played by the Personnel Board members in this case. Butz requires that they be afforded that immunity.

The Court of Appeal's decision attempts to distinguish Butz on three bases. Petitioners maintain that the distinctions made are either inaccurate, or do not justify the difference in result. The first comment by the Eleventh Circuit is that "the Board members are not insulated from political influence." In fact, the members of the Personnel Board are no more subject to political influence than are officials in the executive department of government. One member of the Board is appointed to a six year term by the City's governing body, and another member of the

Board is appointed to a six year term by the county's governing body. Both of these members serve terms which exceed the terms of the officials who appoint them. The reason for having terms of appointees longer than the terms of the appointers is to avoid political influence. That method of avoiding political influence has been utilized in many contexts for many, many years.

The third member of the Board is appointed by the judges of Montgomery County. The judges have absolutely nothing to do with the employees of the City or the County. Moreover, the judges themselves have absolute judicial immunity, and the members of the Personnel Board are simply fulfilling a function which would otherwise fall in the lap of the judiciary. Surely no one can suggest that because a judge appoints a finder of fact, the

finder of fact is subject to political influence.

The next distinction offered by the Eleventh Circuit is that "the Board does not record its proceedings unless a party requests it." The appellate court apparently discounts the fact that all parties are notified of their right to have the proceeding recorded, and that the proceeding may be reported by means of a tape recorder, with no expense to the employee. This notice is sent to every employee who files a notice of appeal, including to the employee's lawyer. Finally, the Eleventh Circuit decision notes that there is no judicial review of the Board's decision. Although the lower court is correct that there is no de novo review, an employee of the City of Montgomery has the same due process right of judicial review as any other public

servant. That is, if the employee can establish that the decision of the Personnel Board was so lacking in factual support as to be arbitrary, the employee would be entitled to relief from the Board's decision on due process grounds. Those grounds, of course, are the only grounds that most public employees have to contest their termination.

In summary, the members of the Personnel Board are in the same position as executive officials acting in a judicial capacity. They should be afforded absolute quasi-judicial immunity.

III.

IN REVIEWING THE MERITS OF A CASE AS TO ALLEGED RACIAL DISCRIMINATION, THE DISTRICT COURT'S FINDING OF DISCRIMINATION IS A DETERMINATION OF ULTIMATE FACT TO WHICH THE "CLEARLY ERRONEOUS" STANDARD OF REVIEW DOES NOT APPLY. CONSEQUENTLY, THE ELEVENTH CIRCUIT ERRED IN APPLYING THE "CLEARLY ERRONEOUS" STANDARD TO THE FINDING OF DISCRIMINATION BY THE DISTRICT COURT IN THIS CASE

The Eleventh Circuit's application of the clearly erroneous rule to the District Court's finding of discrimination merits review by the Supreme Court on certiorari. Without detailing the facts, it suffices at this point to say that the basis of the District Court's finding was that in another case some three years before plaintiff was terminated, two white fire fighters had been reinstated to their positions. They were reinstated after a lengthy hearing before the Personnel Board at which overwhelming mitigating circum-

stances were presented. In this regard, it should be noted that the only facts available to the Personnel Board were those facts presented at each hearing. When Tate Williams was terminated three years later, he also had a hearing. His lawyer, however, presented no mitigating evidence, and the entire hearing lasted only 10 to 15 minutes. Absolutely no evidence was presented to the Personnel Board upon which it could properly modify the City's decision to terminate Tate Williams.

Despite that the District Court's decision was based on sparse, if any, evidence, the Eleventh Circuit affirmed the decision on the basis of the clearly erroneous rule. That rule, however, does not apply to findings of ultimate fact.

As stated in in Mayo vs. Pioneer Bank & Trust Company, 297 F.2d 392 (5th Cir.

1961):

> "Under Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C. the trial judge's findings of fact are conclusive unless clearly erroneous, but when the factual determination is primarily a matter of drawing inferences from undisputed facts or determining their legal implications, appellate review is far broader than where disputed evidence and questions of credibility are involved. Mitchell vs. Scofield, 5th Cir., 1954, 218 F.2d 217."

The Eleventh Circuit should not have bound itself to the "clearly erroneous" rule enunciated in 52(a), Federal Rules of Civil Procedure, because that standard of review does not apply to the finding of ultimate fact. In Phillips, vs. Joint Legislative Committee, 637 F.2d 1014 (5th Cir. 1981), the Court stated:

> "In reviewing the merits of the case as to alleged class discrimination, we keep in mind that the District Court's finding of non-discrimination is a determination of ultimate fact to which the "clearly erroneous" standard of review does not apply."

See also North River Energy Corp. vs. United Mine Workers of America, 664 F.2d 1184, (5th Cir. 1982), which held that the Court is free to make an independent determination of the ultimate fact guided by the trial court's determination of subsidiary facts which are not themselves clearly erroneous. United States vs. Wiring, Inc., 646 F.2d 1037 1041 (5th Cir. 1981).

The question of the applicability of the clearly erroneous rule is one deserving of consideration by the United States Supreme Court. The facts of this case demonstrate those circumstances under which appellate courts have stated positively that the clearly erroneous rule should not apply. Moreover, the unjust result reached by the trial court dramatizes the reason the clearly erroneous rule should not apply.

SUMMARY OF GROUNDS FOR ACCEPTING SUPREME COURT REVIEW

There are three significant issues in this case deserving of Supreme Court review. First, the Eleventh Circuit has improperly interpreted Title VII in such a way that it could have profound consequences on independent agencies that, in the fulfillment of certain duties, serve city and state governments. A novel question is presented with regard to whether or not an agency of a city which, when exercising certain functions, controls access to employment, falls within the purview of Title VII scrutiny in the performance of duties unrelated to access to city employment. This question does not appear to have been previously answered in the Title VII context, although this Court has addressed the question in Imbler vs. Pachtman, supra.

This Court should grant this petition

also because the Eleventh Circuit's decision conflicts with the ruling of this Court in Butz vs. Economou, supra. Under the undisputed facts which have been set forth in this petition, the members of the Montgomery City-County Personnel Board, when hearing and deciding appeals of employment decisions, act independently of the city and county, as required by statute, and fulfill a role functionally comparable to that of a judge. They should, therefore, have absolute, quasi-judicial immunity.

Finally, the Eleventh Circuit has misapplied the "clearly erroneous" rule. The application of that rule goes to the heart of the appellate process. This Court should clarify the rule and define its parameters in such a way that resolves the conflict among the courts of appeal.

CERTIFICATE OF SERVICE

I, Robert D. Segall, a member of the Bar of the Supreme Court of the United States and the attorney for the Montgomery City-County Personnel Board, Ewell Green, Charles Paterson, and Mrs. Ed Reid, do hereby certify that on this 18th day of January, 1985, I did serve the requisite number of copies of the foregoing on the attorneys for all of the other parties in the Court of Appeals, by mailing the same to them first-class postage prepaid and addressed as follows:

Honorable Robert C. Black
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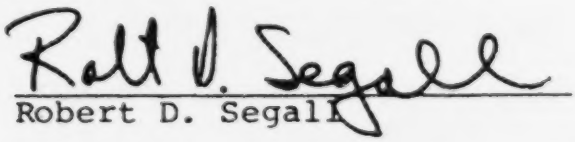

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E X H I B I T S

EXHIBIT "A"

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE MIDDLE DISTRICT
OF ALABAMA, NORTHERN DIVISION

TATE WILLIAMS, Plaintiff,	)	
v.	)	CIVIL ACTION
THE CITY OF MONTGOMERY, a municipal corporation; EMORY FOLMAR, individually and in his official capacity as Mayor of the City of Montgomery, Alabama; THE FIRE DEPARTMENT OF THE CITY OF MONTGOMERY; JIM SUTHERLAND, individually and in his official capacity as Chief of the Fire Department of the City of Montgomery; THE MONTGOMERY CITY-COUNTY PERSONNEL BOARD; EWELL GREEN, MRS. ED. REID, and CHARLES B. PATERSON, individually and in their official capacities as members of the Montgomery City-County Personnel Board, Defendants.	)	NO. 81-323-N

JUDGMENT

Pursuant to the memorandum opinion of the court entered this date, it is the ORDER, JUDGMENT, and DECREE of this court:

(1) That the defendants City of Montgomery and its mayor, Emory Folmar, the defendants City of Montgomery Fire Department and its chief, Jim Sutherland, and the defendants Montgomery City-County Personnel Board and its members, Ewell Green, Mrs. Ed Reid, and Charles B. Paterson shall reinstate the plaintiff Tate Williams as a firefighter with the City of Montgomery Fire Department, within fourteen days from the date of this order, with allowance for a reduction in pay and other benefits comparable to that given William V. Morgan when he was reinstated in 1976, but also with such accompanying promotions and retirement and other benefits which the plaintiff Williams would have received had he not been illegally denied reinstatement on January 25, 1980; and that said defendants, in their official capacities, shall pay backpay, determined according to accepted legal principles, to the plaintiff Williams from January 25, 1980, to the time of his reinstatement;

(2) That the plaintiff Williams be and he is hereby allowed fourteen days from the date of this order within which to file his request for reasonable attorney fees, which request shall address each of the criteria set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974);

(3) That all parties to these proceedings be and they are hereby allowed fourteen days to file a request with this court to determine appropriate backpay, should said parties be unable to agree among themselves as to the amount of backpay to which the plaintiff Williams is entitled; and

(4) That all other relief sought by the plaintiff Williams in this case that is not specifically granted be and the same is hereby denied.

It is further ORDERED that all costs of this proceeding be and they are hereby taxed against the defendants in their official capacities, for which execution may issue.

DONE, this the 19th day of October, 1982.

/s/ MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE MIDDLE DISTRICT
OF ALABAMA, NORTHERN DIVISION

TATE WILLIAMS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL
	)	ACTION
THE CITY OF MONTGOMERY, a municipal corporation; EMORY FOLMAR, individually and in his official capacity as Mayor of the City of Montgomery, Alabama; THE FIRE DEPARTMENT OF THE CITY OF MONTGOMERY; JIM SUTHERLAND, individually and in his official capacity as Chief of the Fire Department of the City of Montgomery; THE MONTGOMERY CITY-COUNTY PERSONNEL BOARD; EWELL GREEN, MRS. ED. REID, and CHARLES B. PATERSON, individually and in their official capacities as members of the Montgomery City-County Personnel Board,	)	NO. 81-323-N
	)	
Defendants.	)	

OPINION

The plaintiff Tate Williams, a black person, has brought this cause of action claiming, first, that the defendants, by terminating his employment as a fireperson because he

received a felony conviction while retaining two white firepersons also convicted of felonies, denied him equal protection of the law in violation of 42 U.S.C. § 1983; and, second, that the defendants by their actions discriminated against him on account of his race in violation of 42 U.S.C. §§ 2000e, et seq., otherwise known as Title VII of the Civil Rights Act of 1964, as amended, and in violation of 42 U.S.C. §§ 1981, 1983, 1985.[1] The defendants are the City of Montgomery and its mayor, Emory Folmar; the Fire Department of the City of Montgomery and its chief, Jim Sutherland; and the Montgomery City-County Personnel Board and its three members, Ewell Green, Mrs. Ed Reid, and Charles B. Paterson.[2] All of the individual defendants are white persons.

Upon consideration of this case, which was tried before the court without a jury, and for reasons which follow, the court is of the opinion that Williams' first claim, denial of equal protection, is time-barred in full; and that his second claim, discrimination on account of race, is time-barred to the extent it is premised on sections 1981, 1983 and 1985, but is not time-barred and has merit to the extent it is premised on Title VII, thereby entitling Williams to appropriate relief.

I. THE FACTS

During all times relevant, the defendant Montgomery City Fire Department had in effect a policy which required the discharge of any fireperson convicted of a felony. In August 1976, two white firepersons, firefighter William V. Morgan and Lt. Lamar Evans, were convicted, after trial in federal court, of the felony of conspiring to operate,

[1]The jurisdiction of this court is properly invoked pursuant to 28 U.S.C. §§ 1331, 1343(3) and 42 U.S.C. § 2000e-5(f)(3).

[2]The Montgomery City-County Personnel Board handles employment matters for both the City and County of Montgomery.

own and conduct an illegal gambling operation in violation of 18 U.S.C. § 371. Morgan was placed on probation for one year and Evans was placed on probation for two years. Although the department's disciplinary board, consisting of several other firepersons, recommended that Morgan and Evans not be terminated, the department's chief at the time, J. A. Odom, rejected the disciplinary board's recommendation and recommended to the director of the City Department of Public Safety, Ed. L. Wright, Jr., and the mayor at the time, Jim Robinson, that both men be discharged. Wright and Robinson accepted Odom's recommendation and Wright mailed Morgan and Evans notices of their dismissal.

Morgan and Evans appealed their dismissal to the defendant Montgomery City-County Personnel Board, which consisted of the defendants Green and Reid and a third member, Thomas M. Tyson, Sr. At the hearing before the board, the Fire Department, while acknowledging that it had an across-the-board policy, did little or nothing to have the policy upheld by the board. The board, therefore, without reviewing the two men's personnel files, but after entertaining testimony from several character witnesses and receiving a letter from the U. S. Attorney recommending that the two men not be terminated, reversed the dismissal of the two men and directed that they both be immediately reinstated without backpay and that Evans be reduced to the rank of a firefighter, with corresponding reduction in pay. It is unclear whether Morgan also suffered a reduction in pay.

Approximately three years later, in November 1979, the plaintiff Williams was convicted, after trial in state court, of the felony of false pretense in violation of § 13-3-92, Code of Alabama 1975, and he was placed on probation for a period of thirteen months. The defendant Sutherland,

who had replaced Odom as chief, recommended to the defendant Folmar, who had replaced Robinson as mayor, that Williams be discharged as a firefighter with the city. Folmar accepted the recommendation and Williams was dismissed on November 14, 1979.

As did Morgan and Evans, Williams appealed his dismissal to the personnel board, which still consisted of the two defendants Green and Reid and Thomas M. Tyson, Sr., who has since left the board and has been replaced by the defendant Paterson. However, unlike in the Morgan and Evans cases, the board on January 25, 1980, sustained Williams' dismissal; but as in the Morgan and Evans cases, it reached its decision without consulting Williams' personnel file.

Williams filed a timely charge with the Equal Employment Opportunity Commission and sometime shortly after March 13, 1981, received a "Notice of Right to Sue Within 90 Days" from the commission. Williams then filed an action in the court on June 10, 1981.

II. THE LAW

As already noted, Williams has two claims against the defendants. The first claim is that the defendants by their actions denied Williams equal protection of the law. *See, e.g., Zeigler v. Jackson,* 638 F.2d 776 (5th Cir. 1981) (the plaintiff's right to equal protection of the law was denied where defendants failed to offer a rational justification for the plaintiff's discharge as a police officer due to his criminal convictions, while three other police officers were retained despite their criminal convictions.)[3] This first

[3]The Eleventh Circuit has adopted as its precedent the decisions of the former Fifth Circuit. *Bonner v. City of Prichard, Alabama,* 661 F.2d 1206 (11th Cir. 1981) (en banc). *See also Stein v. Reynolds Securities, Inc.,* 667 F.2d 33, 34 (11th Cir. 1982) (setting out rules of binding precedent for cases decided after the creation of the Eleventh Circuit).

claim does not involve or turn on Williams' race. The second claim, however, is that the defendants by their actions discriminated against Williams on account of his race. *See, e.g., Brown v. A. J. Gerrard Manufacturing Co.*, 643 F.2d 273 (5th Cir. 1981) (evidence reflected that black employee, discharged for work absences while white employees absent under similar circumstances not discharged, was discriminated against on account of his race.)

The defendants maintain that the first claim, which is premised on section 1983, and the second claim, to the extent it is premised on sections 1981, 1983 and 1985, are barred as not timely filed. The court agrees. Since these sections do not contain any limitations period for filing claims, a court, in considering limitations challenges under these sections, must look to applicable state law; and, further, the Alabama limitations statute applicable to claims brought under these sections is, as the defendants contend, § 6-2-39, Code of Alabama 1975, which contains a one-year limitations period. *Doyle v. University of Alabama in Birmingham*, 680 F.2d 1323, 1325 (11th Cir. 1982) (section 1983); *Rubin v. O'Koren*, 644 F.2d 1023, 1025 (5th Cir. 1981) (section 1983); *Dumas v. Town of Mount Vernon, Alabama*, 612 F.2d 974, 977 (5th Cir. 1980) (sections 1981, 1983 and 1985; *Beards v. Stephens*, 372 F.2d 685, 688-89 (5th Cir. 1967) (section 1985). Williams' contention that Alabama's ten-year limitations statute § 6-2-33 (3), Code of Alabama 1975, governs claims under these sections is without merit. *Nathan Rodgers Construction & Realty Corp. v. City of Saraland, Alabama*, 670 F.2d 16 (5th Cir. Unit B 1982).

Since Williams' claims arose, at the latest on January 25, 1980, when the personnel board sustained his dismissal, and yet this cause of action was not filed until June 10, 1981, more than a year later, his claims under sections

1981, 1983 and 1985 are barred as untimely by section 6-2-39. This result, however, still leaves for the court's consideration Williams' second claim to the extent it is based on Title VII. The defendants do not contend that this claim of racial discrimination under Title VII is barred as untimely and the court, therefore, now turns to and considers the merit in the claim, according to Title VII law.

Proof establishing racial discrimination is seldom direct; rather, in most cases a court must look to surrounding circumstances, circumstantial evidence, to make a determination as to whether a person has been the victim of racial discrimination. Therefore, in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 254, 101 S.Ct. 1089, 1093 (1981), the Supreme Court set forth the manner in which trial courts should consider claims based on Title VII when the evidence is primarily circumstantial. *Lee v. Russell County Board of Education,* 684 F.2d 769, 774 (11th Cir. 1982). A plaintiff has the initial burden of establishing a prima facie case of racial discrimination by a preponderance of evidence, *Burdine, supra,* 450 U.S. at 254, 101 S.Ct. at 1093, which once established raises a presumption that the plaintiff was discharged by the defendant on racially discriminatory grounds, *id.,* 450 U.S. at 254, 101 S.Ct. at 1094. If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to rebut the presumption by producing sufficient evidence to raise a genuine issue of fact as to whether the defendant discriminated against the plaintiff. This may be done by the defendant articulating a "legitimate, non-discriminatory reason" for the discharge, a reason which is "clear and reasonably specific" and worthy of credence. *Id.,* 450 U.S. at 253, 256, 101 S.Ct. at 1093, 1095-96. The defendant has a burden of production, not one of persuasion, and thus it does not have to persuade a court that it was actually

motivated by the reason advanced. *Id.*, 450 U.S. at 254, 101 S.Ct. at 1094. Once the defendant satisfies this burden of production, the plaintiff then has the burden of persuading a court that the proferred reason for the employment decision is a pretext for racial discrimination. The plaintiff may satisfy this burden by persuading the court either directly that a racially discriminatory reason more than likely motivated the defendant or indirectly that the proferred reason for the discharge is not worthy of belief. *Id.*, 450 U.S. at 256, 101 S.Ct. at 1095. By so persuading the court, the plaintiff satisfies his or her ultimate burden of demonstrating by a preponderance of evidence that he or she has been the victim of intentional racial discrimination. *Id.*

To establish a prima facie case, a plaintiff need only show that he or she is a member of the protected class and was discharged while a similarly situated person outside the class was retained. *See, e.g., Lee v. Russell County Board of Education, supra,* 684 F.2d at 773; *Davin v. Delta Air Lines, Inc.*, 678 F.2d 567, 570 (5th Cir. Unit B 1982); *Rohde v. K. O. Steel Castings, Inc.*, 649 F.2d 317, 322 (5th Cir. 1981); *Brown v. A. J. Gerrard Manufacturing Co., supra*, 643 F.2d at 276; *Turner v. Texas Instruments*, 555 F.2d 1251, 1255 (5th Cir. 1977). Williams has done this. He has shown that he, a black fireperson, was discharged because he was convicted of a felony, while two white firepersons, also convicted of felonies, were not discharged. The issue therefore now before the court is whether the defendants have, in turn, met their burden of production for a reason for his discharge.

It is undisputed that the City of Montgomery Fire Department had an objective, across-the-board policy requiring the discharge of any fireperson convicted of a felony. Nevertheless, in the only three instances in which the

policy has been invoked, the personnel board, which was fully aware of the policy, refused to follow the policy in the cases of two white firepersons, but later strictly imposed the policy in the case of a black fireperson. The defendants proffer two reasons for this difference in results. They submit, first that the white firepersons' offenses were less serious than Williams' and, second, that the two white firepersons received support from the Fire Department. Upon consideration of these reasons and the other evidence presented by Williams and the defendants, the court finds these reasons to be pretextual and is of the opinion that Williams has been the victim of racial discrimination.[4]

Although *Burdine* places on a defendant only a burden of production, the case requires that the defendant's

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[4]Personnel board member Reid testified at trial that a third determinative factor was the fact that Morgan and Evans entered guilty pleas to their offenses while Williams was found guilty by a jury. The court notes, however, that in an earlier response to an inquiry as to why Williams was discharged and the two white firemen were not, Reid failed to mention this third reason. *See* Reid deposition, plaintiff's exhibit no. 37. Also, the other board member, Green, never mentioned this third reason, either in deposition or at trial. *See* Green deposition, plaintiff's exhibit no. 36. The court is therefore of the opinion that this third reason was clearly a fabricated afterthought which, if anything, lends support to the conclusion that the other two proffered reasons were pretextual.

Also, the court notes that while Reid claims Morgan and Evans entered guilty pleas and while the person who was U. S. Attorney at the time these two men were charged indicated in a letter that these two men pled guilty, the "judgment and commitment orders" and the "docket sheets" for these two men reflect they did not plead guilty, but rather that they were tried before a court without a jury, after which they were found guilty. *See* plaintiff's exhibit nos. 5 and 14.

Also, Reid noted in a pretrial deposition, introduced at trial, that "[a]ll the testimony before the Personnel Board was to the effect that Morgan and Evans had exemplary records." Plaintiff's exhibit no. 37, p. 7. As to Evans, either the testimony at Evans' hearing before the board was untrue, thereby casting substantial doubt on the vigor with which the City of Montgomery and its officials sought to have upheld Evans' discharge, or Reid failed to present accurately the facts in her deposition; for, the evidence at trial reflected that Evans' record with the Fire Department was far from exemplary. *See* plaintiff's exhibit nos. 21-27. Reid, nevertheless, abandoned this testimony at trial.

proffered reason "be clear and reasonably specific" and worthy of credence. This requirement provides a plaintiff with some protection against the potential for discrimination in subjective personnel criteria, which are a "ready mechanism" for racial discrimination. *Sims v. Montgomery County Commission*, 544 F.Supp. 420, 426 (M.D. Ala. 1982). Therefore, the more subjective the criteria in a defendant's proffered reason, the more difficult will be his or her task in meeting the production burden established in *Burdine*. *Robbins v. White-Wilson Medical Clinic, Inc.*, 660 F.2d 1064, 1067 (5th Cir. Unit B 1981), *vacated on* other grounds, ___ U.S. ___, 102 S.Ct. 2229 (1982).

With these thoughts in mind, the court now assesses the personnel board's reasons for the differing result between the two white firepersons and the black fireperson. As to the first reason, the personnel board and the other defendants have failed to articulate the criteria by which the members of the personnel board decided that one crime necessitated dismissal while another did not; instead, it appear that this determination was left to the unbridled, unguided, subjective discretion of the individual members of the personnel board. Similarly, with regard to the second reason—that the white firepersons had support from the Fire Department—it is totally subjective in nature. *See Lee v. Russell County Board of Education, supra,* 684 F.2d at 775-76 ("Excessively subjective and vague criteria may be insufficient because they do not allow reasonable opportunity to rebut.") Nevertheless, this court refrains from holding that the defendants' proffered reasons are legally insufficient standing alone, because the court is of the opinion that the reasons are legally insufficient when viewed and considered in the context of all the evidence. This is therefore one of the "cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's

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explanation." *Burdine, supra,* 450 U.S. at 255 n.10, 101 S.Ct. at 1095 n.10. *See also Robbins v. White-Wilson Medical Clinic, Inc., supra,* 660 F.2d at 1067.

This other evidence consists of, first, the fact that it was not until after Williams initiated his claims that the personnel board members articulated, let alone adopted, the criteria which they now claim they used in reaching their decision to overturn the discharge of the two white firepersons and uphold Williams', a fact which supports Williams' contention that the criteria, while perhaps descriptive of differences between him and the two white firepersons, were actually not determinative of the outcome of the two cases. Secondly, because the board members never articulated the criteria before Williams initiated his claims, Williams was never aware of the criteria and their possible application to him. And third, the board members completely failed to consult any of the three convicted firepersons' personnel files, with the result that their decision was unsupported and unrelated to any concrete, more objective evidence, such as would ordinarily be found and reflected in personnel files, of the character of these three firepersons and their ability to perform and meet departmental standards; instead, the board members relied on such secondary and extremely subjective evidence as the opinion of the two white firepersons' fellow employees, while faulting Williams for failing to engender similar support. *Cf. Lee v. Conecuh County Board of Education,* 634 F.2d 959, 963 (5th Cir. 1981), *quoting from Crawford v. Western Electric Co.,* 614 F.2d 1300, 1315 (5th Cir. 1980) ("employer may not utilize wholly subjective standards by which to judge its employees' qualifications and then plead lack of qualifications when its promotion process . . . is challenged as discriminatory") (emphasis added). *Cf. also Watson v. National Linen Service,* No. 81-5658, slip op., p. 2828, 2832 (11th Cir. September 20,

1982) (per curiam) ("The failure to establish 'fixed or reasonably objective standards and procedures for hiring' is a discriminatory practice.") It should be added that at the time Williams was asked to engender such co-employee support, the Fire Department had very few blacks.[5]

However, the above discussion of the personnel board's purported criteria assumes that the criteria were in fact applied to the two white firepersons as well as to Williams, albeit in the case of Williams without his knowledge. The court does not accept this assumption. The court is of the opinion and so finds that the board in the Williams case never actually engaged in the comparisons it now asks this court to make and instead it simply upheld and applied the Fire Department's across-the-board policy of discharge.

It should be added that the Fire Department is not without fault in this matter. The evidence amply supports the conclusion that while the Fire Department had an across-the-board dismissal policy of persons convicted of felonies, the department did not seriously seek to have the policy upheld by the personnel board in the cases of the two white firepersons; whereas, with Williams there was no such "indirect support."

Williams, as a victim of racial discrimination, is now entitled to appropriate relief.

III. RELIEF

A person who is a victim of a Title VII violation is entitled to be placed as near as is practicable in the position in which he or she would have been but for the discrimination, subject to some restrictions on backpay. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419-25, 95 S.Ct. 2362,

[5]In fact, at the time of trial only 25 out of 355 firepersons in the department were black. The City of Montgomery has a black population of at least 39%.

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2372-75 (1975). This "make-whole" relief available under Title VII includes first, reinstatement to the position sought, with accompanying promotions and retirement and other benefits which the person would have received had he or she not been illegally denied employment; and, second, backpay from as far back as two years prior to the required filing of a charge with the Equal Employment Opportunity Commission or as far back as the time of the discriminatory dismissal, whichever is more recent, until the time of the person's reinstatement by the employer charged with discrimination, less any amounts the person earned or in the exercise of reasonable diligence should have earned in the interim. 42 U.S.C. § 2000e-5 (g). *See also Marks v. Prattco, Inc.*, 633 F.2d 1122, 1125 (5th Cir. 1981) (per curiam). This backpay relief must be against the defendants in the instant case in their *official* capacities only; Title VII provides no authority to hold public officials *individually* liable for backpay awards. *Clanton v. Orleans Parish School Board*, 649 F.2d 1084, 1099 & n.19 (5th Cir. 1981). Finally, a victim of a Title VII violation is entitled to an award of reasonable attorney fees, 42 U.S.C. § 2000e-5 (k), determined in accordance with standards set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

The court is of the opinion that Williams is entitled to the above relief against all the defendants in their official capacities, subject to the qualification that his backpay should extend only as far back as January 25, 1980, the date of the personnel board decision, rather than to November 14, 1979, when he was discharged, and subject to the further qualification that he suffer a reduction in pay comparable to any Morgan may have received.[8] Morgan

[8]The personnel board and its members contend that any equitable relief under Title VII granted by this court would be inappropriate against them; they claim that they are not "employers" within the meaning of

and Evans did not receive backpay for the period of time between their discharge and reinstatement by the personnel board and Morgan may have received a reduction in pay; Williams should be treated similarly.

IV. CONCLUSION

The court feels compelled to add that there is nothing inherently unlawful, under the provisions of Title VII prohibiting racial discrimination, with the defendants, including the personnel board and its members, adopting an across-the-board policy of dismissal regarding firepersons convicted of criminal offenses, as long as that policy is enforced against all firepersons, without regard to race; and further that there is nothing similarly unlawful with the defendants, including the personnel board and its members, adopting exceptions to that policy, as long as the exceptions are articulated to a reasonable degree and are made known to and applied to all firepersons, without regard to race.

An appropriate judgment will be entered in accordance with this opinion.

DONE, this the 19th day of October, 1982.

/s/ MYRON H. THOMPSON

UNITED STATES DISTRICT JUDGE

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42 U.S.C. § 2000e (a), (b). The City of Montgomery and its mayor, Emory Folmar, and the city's Fire Department, and its chief, Jim Sutherland, contend, on the other hand, that they cannot be held liable under Title VII because the personnel board, not the city and its officials, was responsible for any racially discriminatory actions against Williams.

The evidence reflects, however, that the City of Montgomery is an employing authority within the meaning of Title VII; and that the personnel board and its members, to the extent that they exercise authority over the employees of the City of Montgomery, *see* note 2, *supra*, and the remaining defendants are all agents of the City of Montgomery. Therefore, all the defendants are proper defendants in their official capacities. *Clanton v. Orleans Parish School Board*, *supra*, 649 F.2d at 1095 n.13.

EXHIBIT "B"

Tate WILLIAMS, Plaintiff-Appellee,

v.

The CITY OF MONTGOMERY, et al.,
Defendants-Appellants.

No. 82-7370.

United States Court of Appeals, Eleventh Circuit.

May 3, 1984.

Black fire fighter brought action claiming that defendants, by terminating his employment because he received felony conviction, denied him equal protection of the law and that defendants by their actions discriminated against him on account of his race. The United States District Court for the Middle District of Alabama, Myron H. Thompson, J., 550 F.Supp. 662, found that equal protection claim and non-Title VII claim were time barred, but rendered judgment in favor of fire fighter on his Title VII claim. Defendants appealed. The Court of Appeals held that: (1) justifications offered by city and personnel board for firing black fire fighter after felony conviction and refusing to reinstate him on appeal, while having previously reinstated two white fire fighters fired after felony convictions, were purely speculative and, therefore, insufficient to establish such legitimate, nondiscriminatory reason for firing black fire fighter as would meet prima facie case of racial discrimination; (2) city and personnel board both fell within Title VII prohibition against discrimination by employers; (3) personnel board members were not entitled to absolute immunity, or to good-faith immunity; and (4) city and personnel board were not entitled to jury trial on Title VII claim for back pay.

Affirmed.

1. Civil Rights

Justifications offered by city and personnel board for firing black fire fighter after felony conviction and refusing to reinstate him on appeal, though having previously reinstated two white fire fighters fired after felony convictions, were purely subjective and, therefore, insufficient to establish such legitimate, nondiscriminatory reason for the firing as would meet fire fighter's prima facie case of racial discrimination. Civil Rights Act of 1964, §§ 701-718, as amended, 42 US.C.A. §§ 2000e to 2000e-17.

2. Civil Rights

Title VII definition of employer is to be accorded liberal construction. Civil Rights Act of 1964, § 701 (b), as amended, 42 U.S.C.A. § 2000e (b).

3. Civil Rights

Because it employed more than 15 people and was engaged in industry affecting commerce, city was "employer" for purposes of Title VII. Civil Rights Act of 1964, § 701 (b), as amended, 42 U.S.C.A. § 2000e (b).

See publication Words and Phrases for other judicial constructions and definitions.

4. Civil Rights

City personnel board which controlled access to employment opportunities within city was therefore agent of city for those purposes and, thus, fell within Title VII prohibition against discrimination. Civil Rights Act of 1964, § 701 (b), as amended, 42 U.S.C.A. § 2000e (b).

5. Civil Rights

City personnel board members were not entitled to absolute immunity against back pay award in black fire fighter's Title VII action, since, by nature of members' appointment and pro-

ceedings before the board, safeguards normally inhering in judicial process were absent. Civil Rights Act of 1964, § 706(g), as amended, 42 U.S.C.A. § 2000e-5(g).

6. Civil Rights

City personnel board members were not entitled to good-faith immunity from award of back pay in favor of black fire fighter in Title VII action, since reasonable person would have known that reinstatement of two white fire fighters convicted of felony while black fire fighter was fired for being convicted felon would violate black fire fighter's constitutional rights because of policy mandating firing of all fire fighters convicted of felony. Civil Rights Act of 1964, §§ 701-718, 706(g) as amended, 42 U.S.C.A. §§ 2000e to 2000e-17, 2000e-5(g).

7. Federal Civil Procedure

City and personnel board were not entitled to jury trial on Title VII claim, where plaintiff, a black fire fighter, requested back pay, which is an equitable remedy not requiring determination by jury. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

Appeal from the United States District Court for the Middle District of Alabama.

Before KRAVITCH, JOHNSON and HATCHETT, Circuit Judges.

PER CURIAM:

We determine whether the district court, 550 F.Supp. 662, erred in holding that appellants, the City of Montgomery, its mayor, its fire chief, and the Montgomery City-County Personnel Board and its members, discriminated against Tate Williams, a City fire fighter. We affirm.

The City of Montgomery, Alabama's (City) fire department policy required the discharge of any fire fighter convicted of a

felony. In August, 1976, two white fire fighters were convicted of a felony, and the fire department discharged them. The employees, however, appealed their dismissals to the Montgomery City-County Personnel Board (Board), and the Board reinstated them.[1] In November, 1979, Tate Williams, the appellee, a black fire fighter, was convicted of a felony. The fire department dismissed him, and he was not reinstated by the Board. Williams filed a complaint with the Equal Employment Opportunity Commission and the Commission issued him a "Right to Sue" notice. Williams then sued the City, the Board, and other appellants in district court seeking reinstatement to his job and backpay.

Relying on the three-tier analysis articulated in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the district court ruled that the City and the Board had discriminated against Williams in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e-2000e-17 (West 1981). The court held that the permanent dismissal of Williams, a black fire fighter convicted of a felony, and the dismissal, but reinstatement of the two white fire fighters also convicted of a felony constituted discrimination.

First, the district court held that Williams had fulfilled his burden of establishing a prima facie case of racial discrimination by a preponderance of the evidence. *Burdine*, 450 U.S. at 252-53, 101 S.Ct. at 1093. Second, the district court concluded that the Board and the City had failed to rebut Williams's prima facie case by showing a "legitimate, nondiscriminatory reason" for Williams's permanent dismissal. *Id.* at 252-55, 101 S.Ct. at 1093-94. *See also United States Postal Service Board of Governors v. Aikens*, ... U.S. ....., 103 S.Ct. 1478, 75 L.Ed. 2d 403 (1983). The district court held that the Board and the City had discriminated against Williams because of his race and, therefore, reinstated him to his job and awarded him backpay.

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[1]The Board handles employment matters for the City and the County of Montgomery.

The Board and the City contend that the district court erred in finding that they had discriminated against Williams because of his race. Whether the district court ruling is correct is the easy issue we decide. The district court correctly applied the *Burdine* analysis to this case and its ruling on the issue of discrimination is not clearly erroneous. *Bell v. Birmingham Linen Service*, 715 F.2d 1552, 1557 (11th Cir. 1983); *Harris v. Birmingham Board of Education*, 712 F.2d 1377, 1384 (11th Cir. 1983). The City's and the Board's justifications for firing Williams but retaining the two white fire fighters were purely subjective and, therefore, insufficient to establish a "legitimate, nondiscriminatory reason" for firing Williams.[2]

The City and the Board also contend they are not an employer or an employment agency within Title VII and, therefore, are not liable under Title VII. The district court determined that the City is an employing authority within the meaning of Title VII, and the Board is an agent of the City. Therefore, the district court concluded that Title VII applied to the City and the Board.

Title VII defines employer as a "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person." 42 U.S.C.A. § 2000e(b).[3] This definition is to be accorded a liberal construction. *Quijano v. University Federal Credit Union*, 617 F.2d 129, 131 (5th Cir. 1980). Because it employs more than fifteen people and is "engaged in an industry affecting commerce," the City constitutes an "employer"

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[2]The City and the Board submitted that the white fire fighters' offenses were less serious than Williams's offense and that the white fire fighters received more support from the fire department than did Williams. Besides being subjective, these reasons are irrelevant. The policy requiring the discharge of a fire fighter convicted of a felony was mandatory.

[3]Title VII defines a person as "one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organization, trustees, trustees in cases under Title XI, or receivers." 42 U.S.C.A. § 2000e(a).

for purposes of Title VII. *Dumas v. Town of Mt. Vernon, Alabama*, 612 F.2d 974, 979 (5th Cir. 1980) (the Town of Mt. Vernon is an industry affecting commerce). Since the Board controls access to employment opportunities within the City, it is an agent of the City for those purposes and, therefore, falls within Title VII's prohibition against discrimination. *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338, 1340-41 (D.C. Cir. 1973) (access to job market is a critical factor in discerning Title VII's coverage).

The district court also rejected the Board's contention that it is entitled to either absolute immunity or qualified immunity against the backpay award.

Title VII permits the district court to undertake any affirmative action, including backpay, to halt an employer's discriminatory employment practices. 42 U.S.C.A. § 2000e-5(g). The Fifth Circuit only allows backpay awards against employers in their official capacities. *Clanton v. Orleans Parish School Board*, 649 F.2d 1084, 1099 (5th Cir. 1981). The district court adhered to the Fifth Circuit rule by granting the backpay award against the board members in their official capacities only. The Board and the City, however, cite *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), to support their proposition that they are entitled to absolute immunity.

In *Butz*, the Supreme Court held that federal hearing examiners are absolutely immune from suits for damages. *Id.* at 512-13, 98 S.Ct. at 2913-14. The Court based its decision on the similarity between the federal agency process and the judicial process. The board members contend that the Board's process is so similar to a judicial process that they are also entitled to absolute immunity. This contention lacks merit.

The board members are not insulated from political influence. The City, the county, and the judges of the county appoint board members for a limited time. The Board does not record its proceedings unless a party requests it. No judicial review of the Board's decisions exists; therefore, the safeguards present in a federal agency hearing do not exist in the Board's hearings. The board members are not entitled to absolute im-

munity.[4] Moreover, *Butz* involved a claim for personal damages against government officials.

Finally, the City and Board contend that they are entitled to a jury trial. The district court's decision holding that the City and Board were not entitled to a jury trial is correct. Williams requested backpay which is an equitable remedy not requiring determination by a jury. The Board and the City, therefore, are not entitled to a jury trial on the Title VII claim. *Harkless v. Sweeny Independent School District*, 427 F.2d 319, 323-24 (5th Cir.), *cert. denied*, 400 U.S. 991, 91 S.Ct. 451, 27 L.Ed.2d 439 (1971); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124-25 (5th Cir. 1969), *vacated on other grounds*, 488 F.2d 714 (5th Cir. 1974). For the foregoing reasons, the decision of the district court is affirmed.

AFFIRMED.

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[4]The Board's good-faith immunity claim must also fail. Government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). While this standard applies to personal damages and the instant case involves damages to officials in their official capacity, the board members still fail to meet this standard. A reasonable person would know that the reinstatement of two white fire fighters convicted of a felony while a black fire fighter was fired for being a convicted felon would violate the black fire fighter's constitutional rights because of the policy mandating the firing of *all* fire fighters convicted of a felony. *See Scott v. Dixon*, 720 F.2d 1542, 1547 (11th Cir. 1983).

Tate WILLIAMS, Plaintiff-Appellee,

v.

The CITY OF MONTGOMERY, et al.,
Defendants-Appellants.

No. 82-7370.

United States Court of Appeals, Eleventh Circuit.

May 3, 1984.

Black fire fighter brought action claiming that defendants, by terminating his employment because he received felony conviction, denied him equal protection of the law and that defendants by their actions discriminated against him on account of his race. The United States District Court for the Middle District of Alabama, Myron H. Thompson, J., 550 F.Supp. 662, ruled that city and city-county personnel board and its members discriminated against such fire fighter, and defendants appealed. The Court of Appeals held that: (1) subjective justification for firing such fire fighter and retaining two white fire fighters were insufficient to establish legitimate, nondiscriminatory reason for firing; (2) city was "employer" for Title VII purposes; (3) board was agent for city for Title VII purposes; (4) board was not entitled to absolute or qualified immunity against back pay award; and (5) city and board were not entitled to jury trial.

Affirmed.

1. Civil Rights

City's and city-county personnel board's subjective justifications for firing black fire fighter who had been convicted of felony but retaining two white fire fighters who had been convicted of felonies were insufficient to establish legitimate nondiscriminatory reason for firing such black fire fighter. Civil Rights Act of 1964, §§ 701 to 718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

2. Civil Rights

Title VII definition of employer as "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person" is to be accorded liberal construction. Civil Rights Act of 1964, § 701 (b), as amended, 42 U.S.C.A. § 2000e (b).

3. Civil Rights

City was "employer" for purposes of Title VII where it employed more than 15 people. Civil Rights Act of 1964, § 701 (b), as amended, 42 U.S.C.A. § 2000e (b).

4. Civil Rights

Where city-county personnel board exercised functions judicially exercised by employer, board was agent of employer city for purposes of Title VII. Civil Rights Act of 1964, § 701 (b), as amended, 42 U.S.C.A. § 2000e (b).

5. Civil Rights

City-county personnel board members were not entitled to absolute immunity against Title VII back pay award where such members were not insulated from political influence, were appointed for limited time, board proceedings would be recorded only upon party's request and no judicial review of board's decision existed. Civil Rights Act of 1964, § 706 (g), as amended 42 U.S.C.A. § 2000e-5 (g).

6. Civil Rights

City-county personnel board members did not have good-faith immunity against Title VII back pay award where board, with full knowledge of mandatory policy dismissing all fire persons convicted of felony, followed policy in case of black but not in case of white fire fighters and failed to offer legiti-

mate, nondiscriminatory reasons for such action. Civil Rights Act of 1964, § 706 (g), as amended 42 U.S.C.A. § 2000e-5 (g).

7. Federal Civil Procedure

City and city-county personnel board were not entitled to jury trial in former fire fighter's Title VII back pay action. Civil Rights Act of 1964, §§ 701 to 718, as amended, 42 U.S. C.A. §§ 2000e to 2000e-17.

Appeals from the United States District Court for the Middle District of Alabama.

CORRECTED OPINION

Before KRAVITCH, JOHNSON and HATCHETT, Circuit Judges.

PER CURIAM:

We determine whether the district court, 550 F.Supp. 662, erred in holding that appellants, the City of Montgomery, its mayor, its fire chief, and the Montgomery City-County Personnel Board and its members, discriminated against Tate Williams, a City fire fighter. We affirm.

The City of Montgomery, Alabama's (City) fire department policy required the discharge of any fire fighter convicted of a felony. In August, 1976, two white fire fighters were convicted of a felony, and the fire department discharged them. The employees, however, appealed their dismissals to the Montgomery City-County Personnel Board (Board), and the Board reinstated them.[1] In November, 1979, Tate Williams, the appellee, a black fire fighter, was convicted of a felony. The fire department dismissed him, and he was not reinstated by the Board. Williams filed a complaint with the Equal Employment Opportunity Commission and the Commission issued him a

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[1]The Board handles employment matters for the City and the County of Montgomery.

"Right to Sue" notice. Williams then sued the City, the Board, and other appellants in district court seeking reinstatement to his job and backpay.

Relying on the three-tier analysis articulated in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the district court ruled that the City and the Board had discriminated against Williams in violation of Title VII of the Civil Rights Act of 1964, 42 U.S. C.A. §§ 2000e-2000e-17 (West 1981). The court held that the permanent dismissal of Williams, a black fire fighter convicted of a felony, and the dismissal, but reinstatement of the two white fire fighters also convicted of a felony constituted discrimination.

First, the district court held that Williams had fulfilled his burden of establishing a prima facie case of racial discrimination by a preponderance of the evidence. *Burdine*, 450 U.S. at 252-53, 101 S.Ct. at 1093. Second, the district court concluded that the Board and the City had failed to rebut Williams's prima facie case by showing a "legitimate, nondiscriminatory reason" for Williams's permanent dismissal. *Id.* at 252-55, 101 S.Ct. at 1093-94. *See also United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed. 2d 403 (1983). The district court held that the Board and the City had discriminated against Williams because of his race and, therefore, reinstated him to his job and awarded him backpay.

The Board and the City contend that the district court erred in finding that they had discriminated against Williams because of his race. Whether the district court ruling is correct is the issue we must decide. The district court correctly applied the *Burdine* analysis to this case and its ruling on the issue of discrimination is not clearly erroneous. *Bell v. Birmingham Linen Service*, 715 F.2d 1552, 1557 (11th Cir. 1983); *Harris v. Birmingham Board of Education*, 712 F.2d 1377, 1384 (11th Cir. 1983). The City's and the Board's justifications for firing Williams but retaining the two white fire fighters were

purely subjective and, therefore, insufficient to establish a "legitimate, nondiscriminatory reason" for firing Williams.[2]

The City and the Board also contend they are not an employer or an employment agency within Title VII and, therefore, are not liable under Title VII. The district court determined that the City is an employing authority within the meaning of Title VII, and the Board is an agent of the City. Therefore, the district court concluded that Title VII applied to the City and the Board.

Title VII defines employer as a "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person." 42 U.S.C.A. § 2000e(b).[3] This definition is to be accorded a liberal construction. *Quijano v. University Federal Credit Union*, 617 F.2d 129, 131 (5th Cir. 1980). Because it employs more than fifteen people and is "engaged in an industry affecting commerce," the City constitutes an "employer" for purposes of Title VII. *Dumas v. Town of Mt. Vernon, Alabama*, 612 F.2d 974, 979 (5th Cir. 1980) (the Town of Mt. Vernon is an industry affecting commerce).

"Where the employer has delegated control of some of the employer's traditional rights, such as hiring or firing, to a third party, the third party has been found to be an 'employer' by virtue of the agency relationship." Schlei & Grossman, *Employment Discrimination Law* at 1002 (2d ed. 1983). Alabama Act No. 2284 grants the Board rights traditionally reserved to the employer:

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[2]The City and the Board submitted that the white fire fighters' offenses were less serious than Williams's offense and that the white fire fighters received more support from the fire department than did Williams. Besides being subjective, these reasons are irrelevant. The policy requiring the discharge of a fire fighter convicted of a felony was mandatory.

[3]Title VII defines a person as "one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organization, trustees, trustees in cases under Title XI, or receivers." 42 U.S.C.A. § 2000e(a).

Section 2 (f) To establish, after consultation with the governing body of municipalities and the elective officials of the county, coming within the provisions of the Act, a pay plan for all employees in the classified service. . . .

. . . .

Section 5 (a) The preparation, installation, revision and maintenance of a position classification plan covering all positions in the competitive service.

(b) the formulation of minimum standards and qualifications for each class of position.

. . . .

(f) the evaluation of employees during the probationary period.

(g) the transfer, promotion, demotion and reinstatement of employees in the competitive service, provided that no person shall be transferred, promoted or demoted without the approval of the officer in whom the power to make the appointment is vested by law.

The above regulations illustrate the Board's power to exercise duties traditionally reserved to the employer: establishing a pay plan, formulating minimum standards for jobs, evaluating employees, and transferring, promoting, or demoting employees. These functions are traditionally exercised by an employer, but the Board utilizes these powers in the instant case; and, therefore, the Board is an agent of the City for purposes of Title VII.

The district court also rejected the Board's contention that it is entitled to either absolute immunity or qualified immunity against the backpay award.

Title VII permits the district court to undertake any affirmative action, including backpay, to halt an employer's discriminatory employment practices. 42 U.S.C.A. § 2000e-5 (g). The Fifth Circuit only allows backpay awards against employers in their official capacities. *Clanton v. Orleans Parish School Board*, 649 F.2d 1084, 1099 (5th Cir. 1981). The district court adhered to the Fifth Circuit rule by granting the backpay

award against the board members only in their official capacities. The Board and the City, however, cite *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), to support their proposition that they are entitled to absolute immunity.

In *Butz*, the Supreme Court held that federal hearing examiners are absolutely immune from suits for damages. *Id.* at 512-13, 98 S.Ct. at 2913-14. The Court based its decision on the similarity between the federal agency process and the judicial process. The board members contend that the Board's process is so similar to a judicial process that they are also entitled to absolute immunity. This contention lacks merit.

The board members are not insulated from political influence. The City, the county, and the judges of the county appoint board members for a limited time. The Board does not record its proceedings unless a party requests it. No judicial review of the Board's decisions exists; therefore, the safeguards present in a federal agency hearing do not exist in the Board's hearings. The board members are not entitled to absolute immunity.[4] Moreover, *Butz* involved a claim for personal damages against government officials.

Finally, the City and Board contend that they are entitled to a jury trial. The district court's decision holding that the City and Board were not entitled to a jury trial is correct. Williams requested backpay which is an equitable remedy not requiring determination by a jury. The Board and the City, therefore, are not entitled to a jury trial on the Title VII claim. *Harkless v. Sweeny Independent School District*, 427 F.2d 319, 323-24 (5th Cir.), *cert. denied*, 400 U.S. 991, 91 S.Ct. 451, 27 L.Ed.2d 439 (1971); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124-25 (5th Cir. 1969), *vacated on other grounds*, 488 F.2d 714 (5th Cir. 1974). For the foregoing reasons, the decision of the district court is affirmed.

AFFIRMED.

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[4]Good faith immunity cannot exist when the Board, with full knowledge of the mandatory policy dismissing all fire persons convicted of a felony, followed the policy in the case of a black, but not in the case of a white, and failed to proffer legitimate, nondiscriminatory reasons for such action.

EXHIBIT "C"

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT
OFFICE OF THE CLERK
56 Forsyth Street, N.W.
ATLANTA, GEORGIA 30303

October 22, 1984

TO ALL PARTIES BELOW:

NO. 82-7370 - TATE WILLIAMS v. THE CITY OF MONTGOMERY, et al (D.C. No. CV81-323-N)

This is to advise that an order has this day been entered denying the petition(s) for rehearing:

No member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure: Eleventh Circuit Rule 26), the petition(s) for rehearing en banc has also been denied.

See Rule 41, F.R.A.P., and Eleventh Circuit Rule 27 for issuance and stay of the mandate.

Very truly yours,

SPENCER D. MERCER, Clerk

cc: Robert C. Black
Robert D. Segall
Solomon Seay, Jr.

By: /s/ Denza F. Bankhead
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 82-7370

TATE WILLIAMS,

Plaintiff-Appellee,

versus (filed Oct. 22, 1984)

THE CITY OF MONTGOMERY, et al,

Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 3, 1984, 11 Cir., 198_. ___F.2d____).

(October 22, 1984)

Before KRAVITCH, JOHNSON and HATCHETT, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure;

Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ John W. Hatchett
United States Circuit Judge

EXHIBIT "D"

Act No. 2280 S. 478—Pierce, Jones

AN ACT

Creating and establishing a county-wide personnel system for all counties of the State of Alabama having a population of not less than 150,000 people and not more than than 180,000 people and for municipalities in such counties having a population of 5,000 or more people, all according to the last or any subsequent Federal Census; providing for a personnel department to be composed of a personnel board and a personnel director; providing for the composition, powers, duties, functions and expenses of the Board and for the selection and compensation of its members; providing for the continued service of any board presently serving under any prior Act of the Legislature; providing for the selection, powers, duties and compensation of the personnel director; to require certification of county, municipal, public corporation, board and commission payrolls; making it a misdemeanor to violate the provisions of the Act; repealing all laws or parts of laws inconsistent with the provisions hereof; and providing for an effective date of this Act.

Be It Enacted by the Legislature of Alabama:

Section 1. (a) In each county of the State which has a population of not less than 150,000 people and not more than 180,000 people, according to the last or any subsequent Federal Census, there is hereby created and established a personnel department for the government and control of all employees and appointees holding positions in the classified service, as defined in Section 4, of each such county and in all municipalities in each such county having

a population of 5,000 or more people according to the last or any subsequent Federal Census.

(b) The Personnel Department shall consist of a Personnel Board and a Personnel Director. The Personnel Board shall consist of three members with six year terms, to be appointed in the following manner: one by the governing body of the county, one by the governing body of the municipality therein having the greatest population at the time of such appointment according to the most recent Federal Census, and one by a majority of the circuit judges and probate judge of the county. At the expiration of the term of each member, his successor shall be appointed for a term of six years by the authority appointing the member whose term has expired; provided, however, that any personnel board appointed pursuant to the provisions of any prior acts of the Legislature affecting such counties and municipalities affected by the provisions of this Act, shall continue to serve as the personnel board under the provisions of this Act until the expiration of their respective terms under the prior acts of the Legislature. Vacancies on the Board shall be filled for the unexpired term by the authority appointing the vacating member.

(c) The members of the Board shall be qualified electors of the county. No person shall be appointed to the Board who holds any salaried public office or employment, nor shall any member, while a member of the Board or for a period of one year after he has ceased for any reason to be a member, be eligible for appointment to any salaried office or employment in the service of the county or municipality or any county or municipal elective office.

(d) The Board shall hold one regular meeting each month and such special meetings as it shall deem necessary. The members of the Board shall receive twenty-five

dollars ($25) per diem for each meeting of the Board they attend.

Section 2. The members of the Board shall elect one of their number as chairman. The Board shall determine the order of business for the conduct of its meetings and shall meet on the call of the chairman or two of the members. Two members of the Board shall constitute a quorum for the transaction of business. The functions of the Board shall be:

(a) To formulate and promulgate a set of rules to supplement this Act and revisions and amendments thereof.

(b) To act in an advisory capacity to the governing bodies of the county and municipality on problems concerning personnel administration.

(c) As provided by this Act and by rule, to hear and decide appeals submitted by any person in the competitive service relative to any situation connected with his employment status or condition of employment.

(d) In any investigation or hearing conducted by the Board, it shall have the power to examine witnesses under oath and compel their attendance or the production of evidence before it by subpoenas issued in the name of county or municipality. Each member of the Board shall have the power to administer oaths to witnesses.

(e) To hold hearings on and adopt or revise the position classification plan. The Board shall adopt a position classification plan and class specifications and revisions thereof, allocate and reallocate positions in the competitive service to classes.

(f) To establish, after consultation with the governing body of the county and the governing body of municipalities and the elective officials of the county, coming within the provisions of this act, a pay plan for all employees in the classified service. Such pay plan shall include, for each

class of positions, a minimum and a maximum rate or rates as may otherwise in specific instances be fixed by law and such intermediate rates as may be deemed necessary or advisable by the Personnel Board.

Section 3. (a) The Personnel Board shall appoint a Personnel Director whose duty it shall be to act in the capacity of director for the Personnel system. He shall act as secretary at Board meetings, and shall be the Board's executive officer, but shall not have a vote in determining the Board's policy. He shall perform such duties as are assigned to him by the Board. The compensation of the Director shall be fixed by the Board at a sum not to exceed the maximum rate adopted for classified employees who serve as department heads or as the administrative officers for a department. The Director shall:

(1) Attend all meetings of the Personnel Board.

(2) Administer all provisions of this Act and the rules established hereunder, not specifically reserved to the Personnel Board.

(3) Under the directions of the Board, prepare rules, and revisions and amendments thereof for the consideration of the Board.

(4) Under the direction of the Board, prepare a position classification plan and class specifications and provisions thereof, for the consideration of the Board.

(b) The Director shall recommend to the Board and the Board shall establish, after consultation with the governing body of the county and the governing body of municipalities and the elective officials of the county, coming within the provisions of this Act, a pay plan for all exempted or unclassified employees except:

Officials elected by popular vote and, in case of death, resignation, or removal, their legal substitutes.

Members of appointive boards, commissions or committees.

Employees appointed or employed by the county or city board of education.

Persons in the "Classified Service" within the meaning of and subject to the State of Alabama Merit System under any present or future law, and so long as any such law remains effective and any person whose employment is subject to the approval of the United States Government or any agency thereof.

The Register of the Circuit Court, and the bailiff and court reporter appointed by each judge of the Circuit Court.

Any employee receiving his compensation from any elected official.

Attorneys, physicians, surgeons and dentists who serve part time, excepting the City Recorder and City Prosecutor.

The County Agent, Assistant County Agent, Home Demonstration Agent and Assistant Home Demonstration Agent.

Section 4. The provisions of this Act shall apply to all officers and employees in the service of the county and affected municipalities, except:

(a) Elective officials. Provided however, that in the event the status of an elective officer of the county or municipality is changed to that of an appointive officer, then at the expiration of the term of office of any such officer, the person holding the office at the time of the expiration of the term, providing that he shall have served in such position for a period of at least six months continuously, immediately prior to the expiration of the term of office, shall assume regular status in the competitive service without preliminary examination or working tests and shall thereafter be subject in all respects to the provisions of this Act.

(b) Members of appointive boards, commissions, and committees.

(c) All employees or appointees of the city or county board of education, or persons engaged in the profession of teaching or in supervising teaching in the public schools; excepting, however, personnel employed in kindergartens or schools not a part of the city or county school system operated under the direction and supervision of the city or county board of education.

(d) Common laborers.

(e) Attorneys, physicians, surgeons and dentists who, with the express or implied permission of any appointing authority or of the county or municipality, hold themselves out for employment by others in the same or a like line of work as that performed by them for such appointing authority; excepting, however, municipal recorders or assistant recorders and city or municipal prosecutors or assistant city or municipal prosecutors.

(f) The personnel director provided for by this Act.

(g) Persons in the "classified service" within the meaning of and subject to the State of Alabama merit system under any present or future law, and so long as any such law remains effective.

(h) One private secretary or executive assistant of a member of the governing body of such municipality, the bailiff appointed by each judge of the circuit court, and two clerks to be designated by each county elective official and also the Register of the Circuit Court except the member of the Board of Revenue; and any employee receiving his compensation from any elected official of the county.

Offices, positions and employments not exempted above shall constitute the competitive or classified service of the county and affected municipalities. It is intended hereby to include within the competitive or classified service all offices, positions and employments in each such county and any such municipalities therein as these offices, positions

and employment now exist, or as they may hereafter exist, the holders of which are paid, whether by salaries, wages and fees, in whole or in part from funds or any such county or municipality, or the holders of which receive their compensation from any elected official and perform duties pertaining to the office of such elected official or officer except those hereinabove numerated in this Section. It is also intended hereby that the competitive or classified service shall include all personnel of any public corporation, board, committee, or commission, appointed or created by the governing body of any such county or municipality whether the salaries, wages or compensation of such officers or employees are paid directly by such county or municipality; provided, however, the appointed members of any such public corporation, board, committee or commission shall not be included in the competitive or classified service.

(i) One clerk, deputy or employee to be named by the Clerk of the Circuit Court for his office, and one clerk, deputy or employee to be named by the Register of the Circuit Court for his office.

Section 5. In addition to such other matters as may be necessary and proper to carry out the intent and purposes of this Act, rules shall be formulated and adopted by the Personnel Board establishing specific procedures to govern the following phases of the personnel program:

(a) The preparation, installation, revision and maintenance of a position classification plan covering all positions in the competitive service.

(b) The formulation of minimum standards and qualifications for each class of position.

(c) The public announcement of vacancies and examinations and the acceptance of applications for employment.

(d) The preparation and conduct of examinations and the establishment and use of employment lists containing names of persons eligible for appointment.

(e) The certification and appointment of persons from employment lists to fill vacancies and the making of temporary and emergency appointments.

(f) The evaluation of employees during the probationary period.

(g) The transfer, promotion, demotion and reinstatement of employees in the competitive service, provided that no person shall be transferred, promoted or demoted without the approval of the officer in whom the power to make the appointment is vested by law.

(h) The separation from the service of employees through layoff, suspension, dismissal, and for incapacity to perform required duties.

(i) The standardization of hours of work, attendance and leave, regulations, working conditions, and the development of employee morale, welfare and training. Provided, that no rule or regulation shall prohibit or prevent any employee from working over-time should it be necessary in the public interest in the opinion of the officer in whom the power to make appointments is vested by law; however, any employee who works overtime shall be compensated therefor only by overtime pay for any overtime work performed over forty (40) hours per weeks, holidays or beyond the normal tour of duty.

(j) The maintenance and use of necessary records and forms.

Section 6. (a) Appointments to vacant positions in the competitive or classified service shall be made in accordance with the rules established hereunder and from employment lists resulting from competitive examination, or by promotion, transfer, demotion or reinstatement. Ap-

pointments shall be made by the governing body of the county or municipality, or by the officer in whom the power to make appointments is vested by law.

(b) If appointment is to be made from employment or promotional lists, the names of persons willing to accept appointment shall be certified by the Personnel Director in the order in which they appear on the lists. The number of names certified shall exceed by four the number of vacancies to be filled.

(c) In the absence of appropriate employment lists, a temporary appointment may be made by the appointing power of a person meeting the minimum qualifications for the position, provided, however, that an employment list shall be established for such position within ninety days. No person shall be employed under temporary appointment for a total of more than ninety days in any fiscal year. In the event of emergency, the appointing power may appoint such persons as are required to meet the situation but such appointment shall not exceed thirty working days, except in case of a war emergency so declared by an Act of Congress, such appointments may continue until the termination of such emergency.

(d) No credit shall be allowed in the giving of any examination or the establishment of any employment or promotional lists, for service rendered under a temporary appointment.

(e) During the period of suspension of any employee, or pending final action on proceedings to review the suspension, demotion or dismissal of any employee, the vacancy created may be filled by the appointing power only by temporary appointment.

Section 7. (a) All original and promotional appointments shall be for a probationary period of six months during which the employee may be rejected by the appoint-

ing authorities as set out in Section 6 (a) herein at any time without right of appeal or hearing in any manner.

(b) An employee rejected during the probationary period from a position to which he has been promoted shall be reinstated to the position from which he was promoted, unless charges are filed and he is discharged as provided in this Act and the rules.

(c) Any employee in the competitive service promoted or transferred to a position not included in the competitive service shall be reinstated to the position from which he was promoted or transferred if within six months after such promotion or transfer action is taken to dismiss him, unless charges are filed and he is discharged in the manner provided in this Act and the rules established hereunder for positions in the competitive service.

Section 8. (a) Any person holding a position or employment included in the competitive service, who, on the effective date of this Act, shall have served continuously in such position, or in some other position included in the competitive service, for a period of at least six months immedately prior to such effective date, shall assume regular status in the competitive service in the position held on such effective date without preliminary examination or working tests and shall thereafter be subject in all respects to the provisions of this Act.

(b) Any other persons holding positions or employments in the competitive service shall be regarded as holding their positions or employment as probationers who are serving out the balance of their probationary periods before obtaining regular status.

Section 9. The governing bodies of the county and municipality and any officer in whom is vested by law the power to make transfers, promotions, demotions, reinstatements, layoffs, and to suspend or dismiss employees, shall

retain such power, subject to the provisions of this Act and the rules established hereunder, it being the intent and spirit of this Act to provide a fair and just approach to county and municipal employment in order that employees may be selected and promoted on a merit basis, but in no sense to impair the efficiency of the public service.

(b) Any person holding a position or employment in the competitive service shall be subject to suspension without pay by the appointing power and without right of appeal, but such suspension shall not exceed a total of thirty days in any fiscal year.

Section 10. (a) Any employee in the competitive service who has been demoted, dismissed or reduced in pay, shall be entitled to receive a written statement of the reasons for such action within three days, and he shall have three days' time thereafter within which to answer in writing thereto. A copy of such charges and answers shall be filed with the Personnel Director. In the event the employee files an answer, a copy of such written charges and of such answer shall be transmitted by the Personnel Director to the Personnel Board. Within ten days from the date of filing his answer to the written charges, or in the event such written charges have not been made available to him within the time prescribed, then within ten days after the action taken to demote, dismiss or reduce the pay of the employee, he may file a written demand with the Personnel Director requesting a hearing before the Personnel Board. The Board shall then investigate the case and conduct a hearing as provided by this Act and by the rules.

(b) The provisions of this Section and of Section 11 shall not apply to reductions in pay which are part of a general plan to reduce salaries and wages as an economy measure or as a part of a general curtailment program.

Section 11. (a) Any employee in the competitive ser-

vice shall have the right to appeal to the Personnel Board relative to any situation affecting his employment status or conditions of employment except in instances where the right of appeal is prohibited by this Act. Thereupon the Board shall make such investigation as it may deem necessary and within twenty days after the request for hearing was filed by the employee, the Board shall hold a hearing, at which time it shall hear evidence for and against such employee. Hearings may be informally conducted and the rules of evidence need not apply.

(b) Within ten days after concluding the hearing, the Personnel Board shall certify its findings and order to the authority from whose action the appeal was taken. Such official shall then affirm, revoke or modify the action taken so as to conform with the findings and order of the Board. The findings and order of the Personnel Board shall be final and conclusive and shall not be reviewable in any court.

Section 12. Whenever in the judgment of the governing body of the county or municipality or any elected county official it becomes necessary in the interest of economy or because the necessity for any position in its or his department no longer exists, it or he may abolish any position or employment in the competitive service and lay off the employee holding such position or employment without filing written charges and without the right of appeal. The name of such an employee so laid off shall be placed at the top of the appropriate employment list or lists as provided by the rules.

Section 13. (a) No person holding a position in the competitive service shall seek or accept election, nomination or appointment as an officer of a county or municipal political club or organization, or take an active part in, or make any contribution or donation to, any county or

municipal political campaign, or serve as a member of a committee of such club or organization or circle, or seek signatures to any petition provided for by any election law, or act as a worker at the polls, or distribute badges or pamphlets, dodgers, or handbills of any kind favoring or opposing any candidate for election, or for nomination to a public office, whether county or municipal; provided, however, that nothing in this Act shall be construed to prevent any such officer or employee from becoming or continuing to be a member of a political club or organization, or from attendance at a political meeting, or from enjoying entire freedom from all interference in casting his vote or from seeking or accepting election or appointment to a public office.

(b) Any wilful violation of this Section, or violation through culpable negligence, shall be sufficient grounds to authorize the discharge of any person in the competitive service.

Section 14. No officer, agent, clerk or employee, under the government of the county or municipality and no candidate for any county or municipal office shall, directly or indirectly, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription or contribution, whether voluntary or involuntary for any political purpose whatsoever, from anyone holding any position in the competitive service under the provisions of this Act.

Section 15. In any matter requiring the services of an attorney, the personnel board may call upon the county or city attorney of any such county or city to render such legal services to the board as it may deem necessary or advisable, or the board may employ independent counsel and the compensation of such independent counsel shall be paid as other employees of the board are paid.

Section 16. The compensation and all other expenses of the Personnel Board, the Personnel Director and all others arising under the provisions hereof, shall be paid by warrants drawn by the Board of Revenue on the General fund of the county. At the end of the county's fiscal year it shall prorate the total sum which it has expended for the purpose of this Act between itself and the municipality subject to this Act, charging each with such part of the total sum so expended as the total number of employees of such county, or municipality, who were subject to the provisions of this Act on the last day of the county's fiscal year, bears to the total number of employees of both county and municipality subject to the provisions of this Act on such last day of the county's fiscal year. The sum so arrived at by the county as the proper contribution of each shall be certified to the Personnel Director and when approved by him in writing, shall become a liability of the municipality and shall be paid immediately to the county. In the event the salaries of a county or municipality are paid in part from different treasuries or different funds, in the same treasury, the liability for this contribution shall accrue against such various treasuries or funds in the same proportion, as the salaries of the employees of the county or municipality are paid therefrom. In the event any contribution levied hereunder shall not be paid within thirty days after approval by the personnel Director, the county may bring suit therefor in any court of competent jurisdiction and any judgment so recovered shall be satisfied from any funds in such treasury or funds against which such contribution levy lies.

Section 17. It shall be unlawful for any county, municipal, public corporation, board or commission, official, officer or employee, or any other fiscal officer, to draw or issue any warrant to the county, municipal, public corporation, board or commission treasury, or county, municipal,

public corporation, board or commission depository, for the payment of any salary or compensation to any person in the county, municipal, public corporation, board or commission service for personal services, unless the payroll, estimate, voucher, or account for such salary or compensation containing the name of the person to be paid shall bear the certification of the head of the department wherein such person works that the person or persons named therein are employees of the county, municipality, public corporation, board or commission and are legally entitled to receive the sums stated therein.

Section 18. Any person who violates any of the provisions of this Act shall be guilty of a misdemeanor.

Section 19. The provisions of this Act are severable. If any part of the Act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 20. All laws or parts of laws general, local or special, which conflict with this Act are repealed.

Section 21. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Approved October 1, 1971.

Time: 1:28 P.M.